130

No. 08-672

FILED
MAR 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,

Petitioner,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
Fax: (202) 318-2254

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869
Fax: (505) 848-1882

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Petitioner's Supplemental Brief 1
Introduction 1
I. EIA Has Standing under *Summers* 1
A. EIA Has Standing for "GVR" Relief 3
B. EIA Has Standing for Full Review 3
II. Three-Part Test Warrants No Deference under *Wyeth* 7
A. *Wyeth* Conflates Agency Deference with Notice and Comment 8
B. Three-Part Test Deserves No Deference under *Wyeth* 11
Conclusion 13

TABLE OF AUTHORITIES

Agripost, Inc. v. Miami-Dade County, ex rel. Manager, 195 F.3d 1225 (11th Cir. 1999) 5

Bemis Brothers Bag Co. v. U.S., 289 U.S. 28 (1933) 6

Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984) 11

Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996). 6

Colacicco v. Apotex, Inc., 432 F.Supp.2d 514 (E.D. Pa. 2006) 10

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) 4

Diamond v. Charles, 476 U.S. 54 (1986) 2

Dolenc v. Love, 40 F.3d 656 (3rd Cir. 1994) 5

Ehlert v. U.S., 402 U.S. 99 (1971) 11

Envt'l Protection Information Center, Inc. v. Pacific Lumber Co., 257 F.3d 1071 (9th Cir. 2001) 5

Fertilizer Institute v. U.S. E.P.A., 935 F.2d 1303 (D.C. Cir. 1991) 10

Fitzgerald v. Barnstable School Committee, 504 F.3d 165 (1st Cir. 2007) 2-3

Fitzgerald v. Barnstable School Committee, No. 07-1725 (U.S.) 2-3, 6, 13

In re DES Litigation, 7 F.3d 20 (2nd Cir. 1993) 5

Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419 (5th Cir. 2007) 5

Leslie Salt Co. v. U.S., 55 F.3d 1388 (9th Cir. 1995) 9-10

Lewis v. Casey, 518 U.S. 343 (1996) 2
Long Island Care at Home, Ltd. v. Coke, 127 S.Ct. 2339 (2007) 8
Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991) 11
McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C. Cir. 1988) 8-9
Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992) 10
Nat'l Presto Industries, Inc. v. Dazey Corp., 107 F.3d 1576 (Fed. Cir. 1997) 5
Pearson v. Callahan, 129 S.Ct. 808 (2009) 6-7
Sea-Land Service, Inc. v. Department of Transp., 137 F.3d 640 (D.C. Cir. 1998) 5
Seminole Rock & Sand Co., 325 U.S. 410 (1945) 11
Sierra Club v. Morton, 405 U.S. 727 (1972) 2
Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S.Ct. 2531 (2008) 6
Summers v. Earth Island Institute, 129 S.Ct. 1142 (2009) 1-6
Summers v. Earth Island Institute, No. 07-463 (U.S.), ... 1
University of Texas v. Camenisch, 451 U.S. 390 (1981) 5
Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978) 10-11
Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993) 5

Wyeth v. Levine, ___ S.Ct. ___,
2009 WL 529172 ..... 1, 3, 7-11, 13
Wyeth v. Levine, No. 06-1249 (U.S.)..... 1

Statutes

U.S. CONST. art. III, §2..... 1, 2
U.S. CONST. amend. XIV 3
Administrative Procedure Act,
5 U.S.C. §§551-706..... 8-11
5 U.S.C. §553(b)(3) 8
5 U.S.C. §553(b)(A)..... 8, 10
5 U.S.C. §553(c) 8, 12
5 U.S.C. §706(2)(D)..... 8
Title IX of the Education Amendments of 1972,
§§1681-1688.....*passim*
42 U.S.C. §1983 3

Legislative History

117 Cong. Rec. 30,409 (1971)..... 12
117 Cong. Rec. 39,251 (1971)..... 12
117 Cong. Rec. 39,259 (1971)..... 12
117 Cong. Rec. 39,262 (1971)..... 12
118 Cong. Rec. 5812-13 (1972)..... 12

Rules, Regulations and Orders

Nondiscrimination on the basis of sex in
education programs and activities receiving or
benefiting from federal financial assistance, 40
Fed. Reg. 24,128 (1975)..... 12
Requirements on Content and Format of Labeling
for Human Prescription Drugs and Biologics;

Requirements for Prescription Drug Product Labels, 65 Fed. Reg. 81,082 (2000) 9
Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922 (2006) 9
FED. R. CIV. P. 15 ..... 2, 6
FED. R. CIV. P. 60 2
Sup. Ct. Rule 15.8 ..... 1, 3
Sup. Ct. Rule 23 4

Other Authorities

Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975) 12

PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Equity in Athletics, Inc. ("EIA") respectfully files this supplemental brief pursuant to this Court's Rule 15.8 to explain the relevance of *Summers v. Earth Island Institute,* No. 07-463 (U.S.), and *Wyeth v. Levine,* No. 06-1249 (U.S.), to EIA's petition for a writ of *certiorari.*

INTRODUCTION

After EIA filed its reply brief on February 20, 2009, this Court decided *Summers* and *Wyeth.* As explained in the following two sections, *Summers* relates to EIA's standing to seek not only interim injunctive relief but also appellate review of the decisions below, *Summers v. Earth Island Institute,* 129 S.Ct. 1142 (2009), and *Wyeth* relates to the deference due to respondent Department of Education's "Three-Part Test" on which respondent James Madison University relied to eliminate EIA members' athletic teams and on which the lower courts relied to deny EIA's request for interim injunctive relief. *Wyeth v. Levine,* ___ S.Ct. ___, 2009 WL 529172. Moreover, as further explained in the following two sections, *Summers* and *Wyeth* also both provide additional reasons for this Court to grant the petition for a writ of *certiorari* to clarify important issues of Article III standing and administrative law.

I. EIA HAS STANDING UNDER *SUMMERS*

Summers challenged agency rules and their application at national forests across the country, with particular emphasis on one forest project pending when plaintiffs filed suit. Unfortunately for plaintiffs, they settled their claim as to that forest project, which left them without evidence of standing

to support a permanent injunction. (Their specific affidavits supported standing only to challenge the rule's application at the initial forest project, which no longer injured them, and the balance of their evidence ranged from nonexistent to vague and speculative.) Because a judgment had been entered, plaintiffs could not supplement the record under FED. R. CIV. P. 15 without first seeking relief under FED. R. CIV. P. 60. *Summers,* 129 S.Ct. at 1153; *cf. Sierra Club v. Morton,* 405 U.S. 727, 735 n.8 (1972) ("[o]ur decision does not, of course, bar the Sierra Club from seeking... to amend its complaint by a motion under Rule 15"); *cf. Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992) (lesser showing on standing required at litigation's earlier stages than on merits). *Summers* has obvious relevance whenever litigation outlasts the evidence that establishes the case or controversy.

Under Article III, EIA must have standing to seek this Court's appellate review and must have standing for each form of relief sought. *Diamond v. Charles,* 476 U.S. 54, 65-66 (1986); *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). This Court could provide EIA with two types of relief, one more immediate than the other. First, the Court could "GVR" this case by simultaneously granting the petition for a writ of *certiorari,* vacating the decisions below, and remanding for consideration in light of either or both of *Fitzgerald* on substantive grounds[1]

---

[1] In the Court of Appeals, respondents associated with the James Madison University cited *Fitzgerald*

(Footnote cont'd on next page)

or *Wyeth* on deference grounds. *See* EIA Reply Br. at 1-2 (*Fitzgerald*); Section II, *supra* (*Wyeth*). Second, the Court could issue the writ and hear EIA's appeal, presumably next term. The following two sections address the impact of *Summers* on EIA's standing for those two forms of relief.

A. EIA Has Standing for "GVR" Relief

If this Court issues a GVR this Spring, EIA would have time to seek preliminary and permanent injunctive relief, well in advance of next academic year, when EIA members injured in their freshmen year will be seniors. That provides sufficient redress for GVR relief.

B. EIA Has Standing for Full Review

As indicated in the prior section, EIA's

(Footnote cont'd from previous page.)

v. Barnstable School Committee, 504 F.3d 165, 179-80 (1st Cir. 2007), for the proposition that Title IX preempts EIA's invoking the Fourteenth Amendment under 42 U.S.C. §1983. *See* University Appellees' Br. at 15 & n.24. In its decision issued on January 21, 2009, in *Fitzgerald v. Barnstable School Committee,* No. 07-1725 (U.S.), this Court unanimously rejected the University's preemption theory. Although the University waived its right to respond to EIA's petition for a writ of *certiorari* on December 15, 2008, in advance of the original deadline to respond, the federal respondents' multiple extensions (through February 4, 2009) and this Court's Rule 15.8 would have allowed the University to respond to *Fitzgerald.*

affidavits run at least through the end of the 2009-10 academic year. As such, a decision that this Court issues next term would not benefit all of the affected teams. Indeed, unless the decision comes before the seasons for the spring sports, a decision next term may not reinstate *any* teams for next year (*i.e.*, 2009-10). Under that circumstance, EIA could find itself in a position similar to Earth Island Institute in *Summers*, where EIA's affidavits on imminent injury and redressability have become dated. *Summers*, 129 S.Ct. at 1148. This section addresses EIA's standing for this Court to review the decisions below, assuming *arguendo* that the time comes during this appeal that EIA's affidavits no longer support standing for interim relief.

First, as a practical matter, if this Court grants EIA's petition this Spring, EIA would seek interim relief under this Court's Rule 23 to restore the demoted "club" programs back to intercollegiate status, pending this Court's resolution of the case next term. By reinstating the unlawfully demoted teams, this Court would be assured of an ongoing controversy to maintain those teams, even after the original students graduate.

Second, absent such a stay and even after the original students all graduate, EIA would nonetheless have standing to seek reversal of the lower courts' decisions. Citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333-34 (1980), the weight of circuit authority holds that avoiding an

adverse effect from collateral estoppel or law of the case provides a sufficient case or controversy to support an appeal.[2] By contrast, several circuits have found it circular to argue that preclusion can support standing to appeal when preclusion attaches only to appealable holdings.[3] As explained below, EIA has standing to overturn the Fourth Circuit's impermissible collateral attack doctrine, App. 13a, even if the time comes during this appeal when EIA no longer has standing for interim relief.

In general, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Notwithstanding that general rule, however, courts sometimes give dispositive effect to rulings on interim relief during the later hearing of

---

[2] *See, e.g., Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 427 (5th Cir. 2007); *Agripost, Inc. v. Miami-Dade County, ex rel. Manager*, 195 F.3d 1225, 1230 (11th Cir. 1999); *In re DES Litigation*, 7 F.3d 20, 23 (2nd Cir. 1993); *Dolenc v. Love*, 40 F.3d 656, 657 (3rd Cir. 1994); *Nat'l Presto Industries, Inc. v. Dazey Corp.*, 107 F.3d 1576, 1579 (Fed. Cir. 1997).

[3] *See, e.g., Envt'l Protection Information Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1075-76 (9th Cir. 2001); *Sea-Land Service, Inc. v. Department of Transp.*, 137 F.3d 640, 648-49 (D.C. Cir. 1998); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1282-83 (7th Cir. 1993).

the merits. *See, e.g., Cohen v. Brown University,* 101 F.3d 155, 167-69 (1st Cir. 1996). Unless overturned by this Court, the Fourth Circuit's erroneous "impermissible collateral attack" doctrine could prevent EIA's obtaining relief against the University respondents in the §1983 action that this Court's *Fitzgerald* decision has now authorized.

Unlike the litigation in *Summers,* this litigation has not resolved to a final judgment, and EIA remains free under FED. R. CIV. P. 15 to seek nominal damages and out-of-pocket costs (*i.e.,* anything that does not require the participation of individual members) assigned to EIA by its members. *Sprint Communications Co., L.P. v. APCC Services, Inc.,* 128 S.Ct. 2531, 2542 (2008) (standing to seek assigned damages); *cf. Bemis Brothers Bag Co. v. U.S.,* 289 U.S. 28, 34 (1933) ("[t]he rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not"). Unless overturned by this Court, the Fourth Circuit's "impermissible collateral attack" doctrine could prevent a hearing on the constitutional merits against the University officer defendants, to which EIA otherwise is presumptively entitled.[4] *Pearson v.*

---

[4] EIA's complaint also includes as "Doe defendants" seven other Virginia state schools and their officers, Court of Appeals Joint Appendix 16-17 (¶¶8-11) ("CAJA"), against which EIA also is entitled to seek relief.

Callahan, 129 S.Ct. 808, 818-22 (2009). Under the circumstances, EIA will retain standing to appeal that Fourth Circuit doctrine, even after EIA no longer has standing for a preliminary injunction against James Madison University.

II. THREE-PART TEST WARRANTS NO DEFERENCE UNDER *WYETH*

In *Wyeth,* the majority decision and Justice Breyer's concurrence both emphasize that – while federal regulations may perhaps preempt state law – a *Federal Register* preamble has lesser claims to that power. *See* slip op. at 24 (Stevens, J.); slip op. 1-2 (Breyer, J., concurring). In addition, Justice Stevens notes that the preamble to the proposed rule indicated that the agency would not address preemption, while the preamble to the final rule purported to preempt state law. *Wyeth,* slip op. at 20-21. Under the circumstances in *Wyeth,* this Court concluded (slip op. at 21, 24) that the "agency's views ... are inherently suspect in light of this procedural failure" and "do[] not merit deference for the reasons we have explained."

Those reasons included (1) the agency's reaching an issue in the final rule's preamble that the agency eschewed in the proposed rule's preamble, (2) the preamble's status as less than a regulation with the force of law, (3) the lack of thoroughness, consistency, and persuasiveness in the agency's position, (4) the agency's failing to provide States or interested parties notice or an opportunity for comment, (5) the preamble's inconsistency with congressional intent, and (6) the agency's reversing its longstanding position without adequately

explaining the departure. *Wyeth,* slip op. at 20-24. As explained below, the Department's adoption of the Three-Part Test presents all the same issues and thus *Wyeth* counsels against deference. Before applying *Wyeth,* however, EIA respectfully submits that this Court should clarify *Wyeth* itself to avoid confusion from its conflating divergent aspects of administrative law.

A. *Wyeth* Conflates Agency Deference with Notice and Comment

The Administrative Procedure Act ("APA") requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. §553(b)(3), to offer the opportunity to comment, and to respond to those comments in conjunction with its final rule. *Id.* §553(c). For interpretive rules, however, the APA waives the notice-and-comment requirements altogether. 5 U.S.C. §553(b)(A). Although the APA and courts treat interpretive rules and "legislative rules" subject to the notice-and-comment requirements differently, *Wyeth* apparently conflates the two.

Where the notice-and-comment requirements apply, the final rule must be a "logical outgrowth" of the proposed rule, *Long Island Care at Home, Ltd. v. Coke,* 127 S.Ct. 2339, 2351 (2007) (collecting cases), or the final rule is void *ab initio* as "without observance of procedure required by law." 5 U.S.C. §706(2)(D). If "the notice was inadequate, [the agency's] consideration of the comments received in

response thereto..., no matter how careful, cannot cure the defect." *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1323 (D.C. Cir. 1988) (collecting cases). If the APA notice-and-comment requirements applied to the agency action at issue in *Wyeth,*[5] that agency action was not merely an agency theory that deserved little deference: it was a nullity.

By contrast, if the agency action at issue in *Wyeth* was a mere interpretation, then the deference issue arises. Indeed, there is ample authority for the proposition that a preamble to a legislative rule is an interpretive rule. *See, e.g., Leslie Salt Co. v. U.S.,* 55 F.3d 1388, 1394 (9th Cir. 1995) ("it is plausible to find

---

[5] *See Wyeth,* slip op. at 21 ("the agency finalized the rule and, without offering States or other interested parties notice or opportunity for comment"). To apply the "logical outgrowth" rule to the agency action in *Wyeth,* the Court would have needed consider whether the preemption announced in the notice of final rulemaking related sufficiently to "the agency['s] seek[ing] comment on whether it could take different or additional measures to alleviate product liability concerns," 65 Fed. Reg. 81,082, 81,088 (2000), notwithstanding the agency's "determin[ing] that this proposed rule does not contain policies that have federalism implications or that preempt State law." 65 Fed. Reg. at 81,103; *cf.* 71 Fed. Reg. 3922, 3969 (2006) ("[a]lthough the proposed rule did not propose to preempt state law, it did solicit comment on product liability issues").

that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act"); *Fertilizer Institute v. U.S. E.P.A.*, 935 F.2d 1303, 1309 (D.C. Cir. 1991) (because "EPA's preamble passage represents the agency's attempt to interpret the meaning of a statutory provision," "the rule is interpretative"); *Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 239 (D.C. Cir. 1992) ("[t]he rule, but not the preamble, was subject to notice and comment"); *cf. Colacicco v. Apotex, Inc.*, 432 F.Supp.2d 514, 534 (E.D. Pa. 2006) (holding that the "Preemption Preamble" at issue in *Wyeth* "is an interpretive rule"). If preamble language is merely interpretive, the APA's notice-and-comment procedures do not even apply, 5 U.S.C. §553(b)(A), which means that the logical-outgrowth rule does not apply either.

EIA respectfully submits that the *Wyeth* preamble was an interpretive rule, on which the agency did not owe the States or the interested public an opportunity to comment. *Compare Wyeth*, slip op. at 21 (suggesting the right to comment) *with* 5 U.S.C. §553(b)(A) (no right to comment). Indeed, this Court heretofore has "caution[ed] reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 524-25 (1978) (apart from the APA's and other statutory requirements, "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the

responsibility for substantive judgments"). As such, *Wyeth* departs from this Court's practice by faulting the denial of notice and comment that the APA does not require.

Although not applied in *Wyeth*, the *Seminole Rock* doctrine often leads courts to confer greater-than-*Chevron* deference to spurious, post-promulgation agency interpretations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("ultimate criterion" for judicial construction of ambiguous regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Ehlert v. U.S.*, 402 U.S. 99, 105 (1971) (reviewing court must accept a "plausible construction of the... regulation"); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *cf. Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Whereas *Chevron* encourages legislators to "pass the buck" by enacting vague statutes for agencies to implement, *Seminole Rock* encourages agencies to "hide the ball" by promulgating vague regulations that they themselves authoritatively interpret, post-promulgation. Unfortunately, *Wyeth* gives the lower courts few clues on when to rely on *Seminole Rock* and when to rely on *Wyeth*.

B. Three-Part Test Deserves No Deference under *Wyeth*

EIA respectfully submits that *Wyeth* counsels for rejecting the deeply flawed agency interpretation on which the respondents and lower courts rely here. The Department issued the Three-Part Test in a

1996 memorandum (App. 99a-128a), not a final rule, based on its misunderstanding of its predecessor's 1979 actions. In doing so, the Department reversed without comment not only its predecessor's assurance to Congress that "[d]ocumentation of a failure to meet the [policy interpretation's] compliance factors does not constitute proof that an educational institution has violated Title IX," CAJA 133, 305-07, but also its predecessor's contemporaneous interpretation that Title IX's regulations require assessing the interests of both genders. Pet. at 10 (citing 40 Fed. Reg. 24,128, 24,134 (1975) and *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., at 440 (1975)). Here, in reliance on the Department, the University eliminated ten teams (five expressly *because of* gender), without assessing interest in those sports or comparing that interest to the interest in other sports, for the express purpose of "be[ing] in compliance with the proportionality test of Title IX," CAJA 200, a statute that Congress intended to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." Pet. at 5 (quoting 117 Cong. Rec. 30,409, 39,251, 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972)).

Although the Department and its predecessor provided the opportunity for comment, that opportunity is hollow where the agency simply sidesteps those comments, without responding. 5 U.S.C. §553(c); App. 100a ("Others... suggested that the Clarification, or the Policy Interpretation itself,

provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments."). If children were not being hurt, the Department's serial contradictory positions would be humorous. *Compare, e.g.*, CAJA 134-36, 305-07 (arguing to Congress that the 1979 policy interpretation's "nature does not require the Department to follow notice and comment procedures" to evade procedural requirements because "provision of a comment period may be regarded as a voluntary effort") *with* Fed'l Respondent's Br. at 2 (arguing to this Court that the 1979 policy interpretation issued "following notice and comment"). Under *Wyeth*, the Department's new position deserves no deference.

CONCLUSION

This Court should grant the petition for writ of *certiorari*. If it issues the writ and summarily vacates and remands for consideration in light of *Fitzgerald* on substantive grounds, this Court also should direct consideration in light of *Wyeth* on deference grounds.

March 17, 2009

Respectfully submitted,

Lawrence J. Joseph*
1250 Connecticut Av, NW
Suite 200
Washington, DC 20036
Tel: (202) 669-5135
* Counsel of Record

Douglas G. Schneebeck
Modrall Sperling
500 Fourth Street, NW
Suite 700
Albuquerque, NM 87102
Tel: (505) 848-1869